MARVIN HUTCHINGS
v.
BUREAU OF LAND MANAGEMENT

IBLA 88-349 Decided September 5, 1990

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., relating to decisions by the Salmon District Manager, Idaho, Bureau of Land Management, rejecting applications for a grazing preference and a grazing permit. ID 04-87-01.

Affirmed.

1. Administrative Procedure: Generally--Appeals: Generally--Contests and Protests: Generally--
Grazing Permits and Licenses: Appeals--Rules of Practice: Appeals: Notice of Appeal--Rules of
Practice: Appeals: Timely Filing--Rules of
Practice: Protests

Pursuant to 43 CFR Subpart 4160 a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

2. Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Appeals

Pursuant to the regulations at 43 CFR Part 4100, if an applicant for a grazing preference owns land in a grazing district but that land does not serve as a base for livestock operations which utilize public lands, his application is properly denied.

3. Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Appeals

If an applicant for a grazing preference does not timely file a completed application and moreover offers

a preference right which had previously terminated, a decision denying the application will not be overturned on appeal.

4. Administrative Procedure: Generally--Administrative Procedure: Administrative Review--Appeals: Generally--Grazing Permits and Licenses: Appeals--Rules of Practice: Appeals: Dismissal

An appeal from a decision denying an application for a grazing permit will not be dismissed as moot even though the relevant grazing season has passed, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

5. Federal Land Policy and Management Act of 1976: Land-Use Planning

A BLM decision implementing a resource management plan will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal.

6. Appeals: Jurisdiction--Board of Land Appeals--Federal Land Policy and Management Act of 1976: Land-Use Planning--Rules of Practice: Appeals: Dismissal

Pursuant to 43 CFR 1610.5-2(b) approval or amendment of resource management plans are not appealable to the Board of Land Appeals and an appeal is properly dismissed to the extent that it seeks review of such a plan.

7. Federal Land Policy and Management Act of 1976: Land-Use Planning--Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Appeals

Pursuant to 43 CFR 1610.5-3(a) all resource management authorizations and actions, as well as budget or other action proposals and subsequent more detailed or specific planning, shall conform to the approved resource management plan. A BLM decision to deny a grazing permit application based on incompatibility between the applicable resource management plan and the application shall be affirmed.

APPEARANCES: Marvin Hutchings, Salmon, Idaho, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Marvin Hutchings (Hutchings) has appealed a March 15, 1988, decision by Administrative Law Judge (Judge) John R. Rampton, Jr., 1/ which upheld an April 30, 1987, decision by the Salmon District Manager, Idaho, Bureau of Land Management (BLM), to deny appellant a grazing permit in the Dummy Creek Allotment. 2/

On March 30, 1987, BLM issued a proposed decision denying appellant's March 5, 1987, application to graze livestock in the Dummy Creek Allotment. Appellant protested that decision by document received by BLM on April 7, 1987. By decision dated April 30, 1987, the BLM denial of appellant's grazing application was made final. On April 28, 1987, appellant filed an application for grazing preference in the Dummy Creek Allotment, along with supporting documents. On May 14, 1987, BLM issued a proposed decision denying the grazing preference application. On May 28, 1987, appellant filed a document entitled "Notice of Appeal," which pertains to both the decision of April 30, 1987, and the proposed decision of May 14, 1987.

On July 24, 1987, BLM filed a motion to dismiss the matter, arguing that a previous grazing preference application filed by Hutchings had been denied by a proposed decision, dated December 28, 1984, and that proposed decision was not appealed or protested. BLM maintained that the doctrine of administrative finality precluded further consideration of the matter.
A response to BLM's motion was filed by counsel for Hutchings, and by order dated September 2, 1987, Judge Rampton denied BLM's motion to dismiss.

Judge Rampton held a hearing 3/ on November 3, 1987, in Salmon, Idaho, and issued a decision dated March 15, 1988. On April 6, 1988, appellant filed his notice of appeal of Judge Rampton's decision to this Board, accompanied by his statement of reasons (SOR). In his SOR, appellant presents various arguments and statements concerning the history of the Dummy Creek Allotment prior to his purchase of adjacent land in 1983; asserts that his constitutional rights have been violated by BLM's actions; 4/ contends that

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1/ The Judge's decision and various other documents in the file cite the case number as ID 04-81-01. However, the correct number appears to be ID 04-87-01.

2/ The Dummy Creek Allotment, also known as the 12-Mile Warm Springs Unit, is located in T. 19 N., R. 21 E., Boise Meridian, Lemhi County, Idaho.

3/ The record produced at the hearing did not contain copies of the May 14, 1987, proposed decision or either of appellant's 1987 applications. However, BLM records are public records of which this Board is entitled to take official notice pursuant to 43 CFR 4.24(b). James E. Briggs v. Bureau of Land Management, 99 IBLA 137, 142 (1987). Consequently, we have requested and received from BLM Hutchings' grazing case file.

4/ Appellant has failed to specify the provision of the Constitution he believes BLM has violated. It is well established that the Fifth Amendment does not require compensation for withdrawal of grazing privileges. Acton v. United States, 401 F.2d 896 (9th Cir. 1968), cert. denied, 89 S. Ct.

a grazing application he filed in 1984 should not have been denied; 5/ states that he is willing to erect a certain fence in exchange for a graz-ing preference; argues that it is arbitrary, unreasonable and unsafe for BLM to manage the allotment in the manner it has proposed; and states that BLM should not have been allowed to make a final range management decision from 1984 until 1988 because his range preference was "in litigation" (SOR at 5).

Before addressing the substantive issues herein, it is first necessary to consider a procedural matter relating to the appeal of the grazing preference application. By way of a document dated May 14, 1987, BLM proposed
to deny appellant's preference application. This proposed decision states:

> If you wish to protest this decision in accordance with 43 CFR 4160.2, you are allowed 15 days from receipt of this
> notice within which to file such protest * * *.
>
> In the absence of a protest within the time allowed, the above proposed decision shall constitute my final decision. Should this notice become the final decision and if you wish
> to appeal this decision for the purpose of a hearing before an Administrative Law Judge, in accordance with 43 CFR 4.470, you
> are allowed thirty (30) days from receipt of this notice within which to file such appeal * * *.

(Proposed Decision of May 14, 1987, at 1-2). Appellant received his copy of the proposed decision on May 16, 1987, and filed a document styled "Notice of Appeal" on May 28, 1987, before the proposed decision had become final.

[1] The proposed decision was an interlocutory decision and not subject to appeal. Therefore, the document filed on May 28, 1987, should have been treated by BLM as a protest of the proposed decision. Robert C. LeFaivre, 95 IBLA 26 (1986). However, where a notice of appeal is prematurely filed but the matter is nonetheless forwarded to this Board, the Board may either decide the matter on its merits or remand to BLM for treatment as a protest. Where there is no practical advantage to remanding the case, we are not required to remand for treatment as a protest. Beard Oil Co., 97 IBLA 66 (1987); Robert C. LeFaivre, 95 IBLA at 28. It is clear that to remand this case would be futile; accordingly, we will proceed to decide the matter on its merits.

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fn. 4 (continued)
1003, 393 U.S. 1121 (1969); United States v. Cox, 190 F.2d 293 (10th Cir. 1951), cert. denied, 72 S. Ct. 107, 342 U.S. 867 (1951). A fortiori, an individual such as appellant who has not held grazing privileges can have no claim under the takings clause.

5/ Appellant failed to protest or appeal the 1984 decision. That decision therefore became the final decision for the Department and appellant is precluded by the doctrine of administrative finality from raising in this appeal issues which were decided in the 1984 decision. Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111, 121 (1988).

The standard to be applied in reviewing this matter is that "No adjudication of grazing preference will be set aside on appeal, if it appears that it is reasonable and that it represents a substantial compliance with the provisions of Part 4100 of this title." 43 CFR 4.478(b); Bert N. Smith v. Bureau of Land Management, 48 IBLA 385, 393 (1980). Application of this standard to the facts before us reveals no basis for reversal.

We find no explicit reference in Judge Rampton's decision to the fact that Hutchings appealed the proposed BLM decision of May 14, 1987. It is possible that Judge Rampton considered the issues raised by the preference application to be subsumed by the issues raised by the permit application. To the extent the Judge and BLM considered the preference application it is likely it was treated as an application based on the historical preference rather than as an application for a new preference. 6/ Whether the grazing preference application filed by appellant is viewed as an application for a new grazing preference or as an offer of the historical preference, it is clear that denial was the appropriate action.

[2] One of the goals of the grazing regulations is to stabilize "the livestock industry dependent upon the public range." 43 CFR 4100.0-2. Pursuant to 43 CFR 4110.2-2(c), "the animal unit months of grazing preference are attached to: (1) The acreage of land base property on a pro rata basis, * * *." In order to obtain a grazing preference, one must generally own or control base property. Land owned or controlled by an applicant is base property if "[i]t serves as a base for a livestock operation which utilizes public lands within a grazing district." 43 CFR 4110.2-1(a)(1).

The record reveals that although appellant runs a livestock operation on his private lands, his operation does not utilize public lands. On April 28, 1987, appellant filed along with his application for grazing preference a document entitled "Grazing Application: Supplemental Information." The second page of this document requests information concerning grazing preferences held in other BLM districts and concerning authorization to graze on any other public lands. Appellant left these sections of the form blank. Moreover, at the hearing, appellant responded in the negative to the following question: "Do you have any other public grazing land or any other

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6/ We base this assumption on the issues raised in the decisions. Nonetheless, we find support for the proposition that the preference application was for a new preference as opposed to a transfer of the historical preference. The document entitled "Grazing Application: Preference Summary and Transfer," includes the following instructions on page 1: "To be completed when new base properties are being offered in support of an application, or as the result of a transfer from existing
base property. If this involves a transfer of preference from existing
base property, transferor completes the request for transfer. * * * (See transfer request on reverse.)" (Apr. 28, 1987, Application at 1). On the back of the form is a section entitled "Request for transfer of grazing preference" which is to be completed with, inter alia, the name and signature of the transferor. This section is blank on appellant's application.

place to graze your cattle, except on your private land?" (Tr. 36). Thus, to the extent that appellant's application is for a new grazing preference in the Dummy Creek allotment it is properly denied.

[3] If, on the other hand, appellant intended to offer the grazing preference formerly attached to his land, his application would also be properly denied. Appellant acquired his private lands in July and October 1983, but the subject application was not filed until 1987. The regulation requires that a transfer application be filed within 90 days of sale or lease, 43 CFR 4110.2-3(b), and failure to timely file is grounds for rejecting an application. George Fasselin v. Bureau of Land Management, 102 IBLA 9 (1988). Furthermore, the record compiled at the hearing and the analysis set forth in Judge Rampton's decision clearly demonstrate that the grazing preference had terminated prior to appellant's acquisition of a portion of what was historically base property (Decision at 4-7). Thus, even if appellant had timely filed a properly completed application for transfer, 7/ a BLM decision to reject it would have been upheld on appeal as no preference existed to transfer. See Jimmie & Leona Ferrara, 47 IBLA 335, 340 (1980); Bud Burnaugh, 9 IBLA 6 (1973).

[4] There remain to be considered various issues concerning BLM's rejection of appellant's application for a permit to graze. As the 1987 grazing season is now past, the question of whether BLM's April 30 decision was proper has become moot. However, we will decline to dismiss an appeal on the basis of mootness if the issues raised on appeal are capable of repetition and failure to decide the appeal would cause substantial issues to evade review. Southern Utah Wilderness Alliance, 111 IBLA 207 (1989). Appellant filed grazing applications in both 1984 and 1987, and we find the likelihood of repetition to be substantial. Moreover, the short period of time between denial of applications for a particular grazing season and the end of the season suggests that effective review would be unlikely were we to dismiss for mootness. We find these issues to be capable of repetition, yet evading review, and consequently this appeal is not dismissed for mootness.

We find that BLM properly denied appellant's application for a permit to graze on public lands during the 1987 season. Pursuant to 43 CFR 4110.1, to qualify for grazing use on the public lands an applicant must own or control land or water base property, inter alia, with certain exceptions not applicable herein. Appellant owns no land base property, supra, and there is no suggestion in the record that he controls any water base property. Thus, we cannot find Hutchings is qualified for grazing use of the public lands and BLM properly denied his application to graze thereon in 1987.

7/ We note that an application for transfer of a preference should be signed by the transferor, supra. In this case, not only has no transferor completed the application, but it is entirely unclear who the transferor would be as we agree with the Administrative Law Judge's conclusion that the preference terminated no later than May 1, 1983 (Decision at 6-7).

Appellant argues that BLM's management of the Dummy Creek Allotment is unreasonable, unsafe, and arbitrary. BLM has indicated in the Lemhi Resource Management Plan (RMP) (Exh. E), 8/ in its correspondence with appellant (Decision of Apr. 30, 1987; Proposed Decision of May 14, 1987, at 1), and at the hearing conducted by Judge Rampton (Tr. 61-62) that it intends for the allotment to be used for 2 years of every 3 as extra range for local users of public range whose usual rangelands could benefit from a rest. In the third year, the Dummy Creek Allotment would not be grazed by cattle. Appellant contends that this form of management is unreasonable because the Dummy Creek Allotment is unfenced and a succession of cattle will mingle with the purebred livestock which he grazes on his private land contiguous to the allotment, and because the cattle will stray onto a nearby highway. Judge Rampton found that Hutchings' fencing concerns do not support his assertion that BLM's management plan for the pasture is unreasonable (Decision at 8).

[5] A BLM management decision implementing an RMP will be affirmed if the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal. Uintah Mountain Club, 112 IBLA 287, 289 (1990); Albert Yparraguirre, 105 IBLA at 248; Wilderness Society, 90 IBLA 221, 232 (1986).

Appellant has neither alleged nor established that BLM's decision is not based on a consideration of all relevant factors or is unsupported by the record. Appellant contends that BLM should place more emphasis on the effects its management plan will have on his grazing operation and use of the nearby highway; however, he has failed to establish that these are relevant factors which BLM did not consider. Appellant has stated that he disagrees with BLM's management of the allotment; however, mere differences of opinion are not grounds for reversal on appeal. Uintah Mountain Club, 112 IBLA at 289; John Schandelmeier, 56 IBLA 284, 287 (1981). Thus, we affirm Judge Rampton's finding that the BLM management plan for the Dummy Creek Allotment is reasonable.

[6] Appellant also argues that BLM should not have adopted the Lemhi RMP (Exh. E) while the issues surrounding his grazing privileges were undecided. However, pursuant to 43 CFR 1610.5-2(b) approval or amendment of RMP's are not appealable to this Board. Albert Yparraguirre, 105 IBLA at 248. Thus, to the extent that appellant has appealed the Lemhi RMP, his appeal is hereby dismissed for lack of jurisdiction.

[7] Pursuant to 43 CFR 1610.5-3(a), all resource management authorizations and actions and detailed and specific planning undertaken subsequent

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8/ As BLM's management of the Dummy Creek Allotment is outlined in the Lemhi RMP, Hutchings is effectively appealing implementation of an RMP. Management decisions implementing RMP's, as opposed to the RMP's themselves, are within the jurisdiction of this Board. 43 CFR 1610.5-3(b); The Wilderness Society, 109 IBLA 175 (1989); Albert Yparraguirre, 105 IBLA 245, 248 (1988).

to the RMP must conform to the RMP. Thus, BLM is required to manage the Dummy Creek Allotment as outlined in the RMP, until or unless the RMP is amended pursuant to 43 CFR 1610.5-5. Accordingly, the denial of Hutchings' permit application is affirmed based on BLM's duty to conform management decisions with the RMP.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Rampton's decision is affirmed.

John H. Kelly
Administrative Judge

I concur:

James L. Burski
Administrative Judge